

**STATE BAR COURT  
REVIEW DEPARTMENT**

In the Matter of

**RICHARD K. CACIOPPO**

A Member of the State Bar

No. 87-O-11458

Filed July 20, 1992; reconsideration denied, September 24, 1992

**SUMMARY**

Respondent handled several legal matters for members of a family of which he was a longtime friend, including obtaining a personal injury settlement for an adult daughter of the family. Believing that he was authorized to do so, respondent applied the client's share of the proceeds of the settlement to pay a small portion of his fees for legal services rendered to the client and her parents in other matters. The daughter obtained a small claims court judgment for the settlement proceeds, but respondent did not pay it, and the clients complained to the State Bar. After the complaint was made, but before formal charges were filed, respondent met with the clients and paid the small claims judgment plus interest.

The State Bar charged respondent with misappropriation, misrepresentation to one of the clients, trust account violations, failure to account, failure to communicate with the clients, and obtaining a pecuniary interest adverse to the personal injury client without the client's written consent. At the trial, the father of the family retracted most of his complaint, and testified that, although he had forgotten the fact, he had actually authorized respondent, with his daughter's consent, to apply the personal injury settlement proceeds to respondent's bill. Respondent corroborated this testimony and produced a letter from the father authorizing the payment. The hearing judge disbelieved both respondent and the father, and termed the letter "suspicious." She held that respondent had violated his duty to the daughter by not ensuring that the father had actual authority to authorize the payment, and therefore found respondent culpable of misappropriation by unilateral fee determination. She also found him culpable of misrepresentations and other rule violations, and recommended one year of actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review, arguing that he was culpable at most of minor rule violations. The review department, while deferring to the hearing judge's credibility determinations, found that the substantial conflicts in the evidence precluded finding that there was clear and convincing evidence of misappropriation or misrepresentations. It found respondent culpable only of failing to render a proper accounting and failing to communicate. In light of respondent's significant mitigating evidence and his prior disciplinary record, which consisted of a public reproof, the review department recommended a six-month stayed suspension and one year of probation with trust accounting and law office management conditions.

COUNSEL FOR PARTIES

For Office of Trials: Russell Weiner

For Respondent: Richard K. Cacioppo, in pro. per.

HEADNOTES

- [1 a, b] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**  
**162.20 Proof—Respondent’s Burden**  
**755.52 Mitigation—Prejudicial Delay—Declined to Find**

Where a fire which destroyed some of respondent’s files did not occur until over a year after respondent had promised the State Bar to check his files in response to a client complaint, respondent demonstrated no prejudice from the State Bar’s delay in bringing formal charges arising out of the complaint.

- [2 a-c] **102.90 Procedure—Improper Prosecutorial Conduct—Other**  
**135 Procedure—Rules of Procedure**  
**139 Procedure—Miscellaneous**  
**162.20 Proof—Respondent’s Burden**

Under Supreme Court precedent and the State Bar Rules of Procedure, before entering into a stipulation resolving a disciplinary matter, the State Bar should notify the respondent of any other pending investigations or complaints. However, where respondent had been notified of a second JFM complaint before respondent entered into a stipulation to a public reproof in an earlier, separate matter, respondent demonstrated no prejudice from the failure of the earlier stipulation to refer to the pendency of the second complaint. (Rules Proc. of State Bar, rule 406.)

- [3 a, b] **162.20 Proof—Respondent’s Burden**  
**166 Independent Review of Record**

The standard of review applied by the Supreme Court and the review department is independent review of the record, giving deference to the credibility determinations of the hearing judge. Unlike in the Supreme Court, in the review department the respondent does not have the burden of demonstrating that the hearing decision is erroneous. The review department makes its own independent determination whether there is clear and convincing evidence to support culpability, giving great weight to the hearing judge’s findings resolving issues pertaining to testimony, but also taking into account the hearing judge’s evaluation of the believed witness’s general credibility.

- [4] **162.11 Proof—State Bar’s Burden—Clear and Convincing**  
**165 Adequacy of Hearing Decision**  
**166 Independent Review of Record**

Testimony disregarded by the hearing judge which provides a plausible explanation of the respondent’s conduct may be considered on de novo review as evidence that the hearing judge’s fact findings were not supported by clear and convincing evidence. On independent review of the record, both the Supreme Court and the review department resolve all reasonable doubts and inferences in favor of the respondent.

- [5] **241.00 State Bar Act—Section 6147**

Respondent’s oral contingent fee agreement with a personal injury client was voidable by the client under section 6147, but respondent was entitled to a reasonable fee. Where the reasonable value of respondent’s services exceeded the amount of the contingency fee, the hearing judge properly found that respondent was entitled to the contingency fee amount.

- [6]      **159      Evidence—Miscellaneous**  
          **161      Duty to Present Evidence**  
          **162.90   Quantum of Proof—Miscellaneous**  
Where the respondent's testimony is plausible and uncontradicted, it should be regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered.
- [7]      **142      Evidence—Hearsay**  
It was error to sustain the examiner's objection to respondent's testimony about statements made by the complaining witness at a meeting, where the complaining witness had been asked about the meeting on cross-examination and given an opportunity to explain or deny respondent's testimony.
- [8]      **120      Procedure—Conduct of Trial**  
          **141      Evidence—Relevance**  
          **148      Evidence—Witnesses**  
          **159      Evidence—Miscellaneous**  
Even if it was error for hearing judge to allow examiner to ask leading questions of complaining witness on direct examination, and to admit testimony as to witness's state of mind when such state of mind was not relevant, such errors were not prejudicial where complaining witness's testimony was clearly insufficient to establish State Bar's case and was not relied on in hearing judge's findings.
- [9 a, b] **120      Procedure—Conduct of Trial**  
          **142      Evidence—Hearsay**  
          **148      Evidence—Witnesses**  
Where respondent's testimony regarding statements made to respondent by complaining witness was offered to impeach complaining witness on a crucial issue, at a time when complaining witness was still subject to recall for further testimony, such testimony should not have been excluded except in the interests of justice. Exclusion of the testimony might have been justified by the length of the proceedings and respondent's lack of an explanation for failing to cross-examine complaining witness regarding statements at issue.
- [10]     **120      Procedure—Conduct of Trial**  
          **159      Evidence—Miscellaneous**  
          **192      Due Process/Procedural Rights**  
State Bar disciplinary proceedings are unique—not criminal, civil or administrative. Nonetheless, the respondent is entitled to a guarantee of a fair hearing, one of the elements of which is the right to offer relevant and competent evidence on a material issue. Denial of such right is almost always reversible error.
- [11]     **148      Evidence—Witnesses**  
          **162.11   Proof—State Bar's Burden—Clear and Convincing**  
          **165      Adequacy of Hearing Decision**  
Where State Bar's chief witness exhibited poor memory, repeatedly testified inconsistently on key issues, admittedly had misrepresented facts to insurance company and State Bar, and admittedly was motivated by anger and economic stress at time of complaint to State Bar, hearing judge's findings based solely on selected portions of such witness's inconsistent testimony were not supported by clear and convincing evidence in light of the record as a whole.

- [12 a-c] **159 Evidence—Miscellaneous**  
**162.11 Proof—State Bar’s Burden—Clear and Convincing**  
**165 Adequacy of Hearing Decision**  
**166 Independent Review of Record**  
No deference was due to hearing judge’s reliance on letters from complaining witness to State Bar, since such letters were not testimony but documentary evidence. Findings based on selected portions of the witness’s testimony, which were contradicted in other portions of such testimony, and on the witness’s demonstrably untrustworthy hearsay statements in the letters to the State Bar, were not supported by clear and convincing evidence in the record as a whole.
- [13] **159 Evidence—Miscellaneous**  
**165 Adequacy of Hearing Decision**  
Assuming hearing judge disbelieved testimony of all witnesses as to facts exculpating respondent, this was not a basis to find culpability. Testimony not worthy of belief does not reveal the truth itself or warrant an inference that the truth is the converse of the rejected testimony.
- [14] **159 Evidence—Miscellaneous**  
**162.11 Proof—State Bar’s Burden—Clear and Convincing**  
**162.90 Quantum of Proof—Miscellaneous**  
State Bar has burden to prove culpability by clear and convincing evidence. Where respondent’s version of the facts is plausible, even if controverted, it supports a reasonable inference of lack of misconduct.
- [15 a, b] **145 Evidence—Authentication**  
**162.19 Proof—State Bar’s Burden—Other/General**  
Documents must be authenticated before they can be introduced into evidence. Authentication means establishing by evidence or other means that the document is the writing which its proponent claims it is. By admitting a document into evidence, hearing judge initially concluded that there was sufficient evidence that it was what it was claimed to be. By allowing the document to be admitted as an authenticated exhibit and not offering affirmative evidence of fabrication, examiner provided court with no basis to find that document was in fact fabricated.
- [16 a, b] **162.11 Proof—State Bar’s Burden—Clear and Convincing**  
**166 Independent Review of Record**  
Given conflicting documentary evidence and unreliable and inconsistent testimony by complaining witness, review department may conclude on independent review, without attempting to resolve such evidentiary conflicts, that State Bar did not meet its burden to show culpability by clear and convincing evidence to a reasonable certainty.
- [17 a, b] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**  
Invoice to client for hourly fees should not have included time spent on personal injury matter which was covered by a separate contingency fee agreement, because of potential client confusion. More importantly, respondent should have given clients an opportunity to review such bill before, not after, receiving authorization to pay portion of bill out of client’s share of proceeds of personal injury matter.
- [18] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
**410.00 Failure to Communicate**  
Respondent violated duty to communicate with client where, after receiving notice that client disputed respondent’s use of client’s settlement proceeds to pay respondent’s bill for services to

client's family, respondent failed to communicate with client to ensure that client's father had been authorized to discharge family's indebtedness for fees out of client's personal injury recovery. Such failure to communicate violated the duty to perform legal services competently.

**[19] 273.00 Rule 3-300 [former 5-101]**

Where client's father authorized respondent in advance to apply client's share of recovery in personal injury matter to respondent's fees for services to client and family in other matters, this did not establish that respondent obtained a pecuniary interest in the recovery adverse to that of client, in violation of rules governing business transactions with clients. Even if a pecuniary interest was acquired, respondent was not culpable of knowingly requiring such interest, where respondent did not rely on the initial authorization, and specifically sought authorization to apply the recovery to fees at the time the personal injury settlement proceeds were distributed.

**[20] 162.11 Proof—State Bar's Burden—Clear and Convincing**

**165 Adequacy of Hearing Decision**

**545 Aggravation—Bad Faith, Dishonesty—Declined to Find**

The State Bar must prove aggravating factors as well as culpability by clear and convincing evidence to a reasonable certainty. Accordingly, finding in aggravation of bad faith could not be predicated on selected portions of complaining witness's unreliable correspondence and inconsistent testimony.

**[21 a, b] 191 Effect/Relationship of Other Proceedings**

**582.50 Aggravation—Harm to Client—Declined to Find**

**595.90 Aggravation—Indifference—Declined to Find**

Findings in aggravation of harm to client and indifference to rectification of misconduct, based on delay in restitution of funds, could not be supported where there was no clear and convincing evidence that respondent had originally acted improperly in applying such funds to respondent's fees based on good faith belief that client had authorized such payment. Client's small claims court judgment against respondent did not operate as res judicata on issue of obligation to make restitution.

**[22 a-c] 615 Aggravation—Lack of Candor—Bar—Declined to Find**

Finding in aggravation of lack of candor with State Bar was not justified, where respondent's testimony was not implausible, and contrary testimony of complaining witness contained repeated self-contradictions. Respondent's failure to respond to client's small claims complaint did not establish that respondent was not candid, nor did respondent's lapses in memory.

**[23] 148 Evidence—Witnesses**

**162.11 Proof—State Bar's Burden—Clear and Convincing**

Proof by clear and convincing evidence to a reasonable certainty means that irreconcilable conflicts in the testimony of the chief State Bar witness by their very nature severely undermine the State Bar's case.

**[24] 611 Aggravation—Lack of Candor—Bar—Found**

Where respondent answered one letter from State Bar, but ignored two others before answering a fourth, and was not diligent in responding the State Bar's inquiry, lack of full cooperation with State Bar was a factor in aggravation.

- [25]     **120     Procedure—Conduct of Trial**  
          **162.20   Proof—Respondent’s Burden**  
          **615     Aggravation—Lack of Candor—Bar—Declined to Find**  
          Although not constituting a factor in aggravation, respondent’s trial tactics in not revealing exhibits to examiner in advance undermined respondent’s credibility with hearing judge, created risk that exhibits would be excluded, and unnecessarily prolonged hearing.
- [26 a, b] **174     Discipline—Office Management/Trust Account Auditing**  
          **511     Aggravation—Prior Record—Found**  
          **805.10   Standards—Effect of Prior Discipline**  
          Where reproof would ordinarily have been appropriate for misconduct involving minor rule violations, but respondent had a prior public reproof and appeared to need to reorganize law practice, appropriate discipline was six months stayed suspension with probation conditions including trust accounting and completion of a law office management class.
- [27]     **173     Discipline—Ethics Exam/Ethics School**  
          Review department declined to recommend that respondent take California Professional Responsibility Examination where respondent had recently taken and passed Professional Responsibility Examination in compliance with earlier public reproof.

ADDITIONAL ANALYSIS

**Culpability**

**Found**

- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]  
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]

**Not Found**

- 221.50 Section 6106  
273.05 Rule 3-300 [former 5-101]  
280.05 Rule 4-100(A) [former 8-101(A)]  
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]  
420.55 Misappropriation—Valid Claim to Funds

**Aggravation**

**Declined to Find**

- 525     Multiple Acts

**Mitigation**

**Found**

- 740.10 Good Character  
765.10 Pro Bono Work

**Discipline**

- 1013.04 Stayed Suspension—6 Months  
1017.06 Probation—1 Year

**Probation Conditions**

- 1022.10 Probation Monitor Appointed  
1025     Office Management  
1026     Trust Account Auditing

**Other**

- 103     Procedure—Disqualification/Bias of Judge

## OPINION

PEARLMAN, P.J.:

This case illustrates why extended legal services performed for close friends require the same strict adherence to professional rules and recordkeeping as services for regular clients. It involves a lengthy hearing on a single count charging misappropriation by respondent, Richard Cacioppo, of \$1,100 in settlement proceeds due a client who was the adult daughter of a longtime family friend, and alleging misrepresentations in connection therewith. Respondent claimed he was authorized to apply the money in satisfaction of more than \$13,000 in previously unbilled legal services rendered to the client and her parents. He, nonetheless, belatedly paid a small claims default judgment obtained by them and they thereafter asked to have the charges dismissed. At trial, the client's father, Michael Laurita, was ruled a hostile witness to both sides under Evidence Code section 776 and contradicted most of the allegations in the two letters he wrote which initiated the State Bar proceeding. Indeed, as noted by the examiner in his opposition to respondent's motion to dismiss: "The testimony of the Laurita's [sic] at the hearing was inconsistent in many respects with the statements made in the letters written earlier to the State Bar. . . . Without examining each paragraph of the letters individually at this point the sum and substance of the Lauritas' testimony at the hearing countered specific statements in the letters as well as being inconsistent with the entire tone, tenor and conclusion reached in the letters."

The hearing judge denied respondent's motion to dismiss the charges, but indicated at the close of the culpability hearing in May of 1990 that the evidence of authorization by Mr. Laurita appeared far more plausible than the evidence of misappropriation. Upon further consideration after receipt of post-hearing briefs, the hearing judge reached the opposite conclusion. In her written decision filed in August of 1991, she concluded that both Mr. Laurita's testimony and respondent's testimony on the issue of authorization were not credible. She found respon-

dent culpable of misappropriation by unilateral fee determination and also culpable of misrepresentations in violation of Business and Professions Code section 6106. She also found several rule violations and various aggravating factors. In mitigation, she found that respondent had made belated restitution and, more significantly, had presented "an extremely impressive array of evidence, both testimonial and by letter, from a wide range of references in the legal and general communities attesting to his good character." (Decision, p. 29.) She recommended one year of actual suspension as the minimum applicable discipline for misappropriation under the Standards for Attorney Sanctions for Professional Misconduct ("the standards") (Trans. Rules Proc. of State Bar, div. V). No reference was made in the decision to Supreme Court decisions distinguishing unilateral fee determination from wilful misappropriation. (See, e.g., *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 329; *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092.)

The respondent's request for review seeks dismissal of the charges or, at most, a finding of culpability of only minor rule violations justifying no actual suspension. The request for review presents a number of evidentiary issues. The examiner argues that, although the hearing judge was required to find proof by clear and convincing evidence, the standard on review of the hearing judge's decision is that all factual findings should be sustained if there is substantial evidence to support them. The examiner further argues, among other things, that the hearing judge impliedly found one key trial exhibit to have been fabricated for the hearing by respondent and Mr. Laurita.

We address all of the issues raised and conclude that, even deferring to all of the credibility determinations made below, due to substantial conflicting evidence, including contradictory testimony of Mr. Laurita on all of the key issues, there was insufficient proof of misappropriation and misrepresentations. However, we do find sufficient evidence to support the judge's conclusion that respondent failed to render a proper accounting to the client and failed to communicate with the client for a period of time

following the settlement in violation of former rules 8-101(B)(3) and 6-101(A)(2).<sup>1</sup>

If respondent's misconduct were a first offense by a practitioner of 17 years, it would ordinarily justify a reproof, especially in light of the extremely impressive array of character evidence found by the hearing judge. However, respondent was previously reproofed in 1989. Pursuant to the standards, we therefore recommend that the Supreme Court impose a six-month stayed suspension and that respondent be placed on probation for a period of one year on conditions including trust accounting and law office management provisions.

## DISCUSSION

### Prejudicial Delay in Prosecution

[1a] Respondent argues that there was prejudicial delay by the State Bar in bringing this proceeding which impaired his ability to defend against the charges because of a fire in 1988 which destroyed many of his files. [2a] He contends that this proceeding should have been consolidated in 1987 with an earlier-initiated State Bar proceeding (83-O-11550) which was resolved by stipulation to a public reproof approved by the volunteer review department in 1988.

[2b] The stipulation in 83-O-11550 recited that it was executed in accordance with former rules 405 through 408 of the State Bar Rules of Procedure, but did not refer to the pendency of any other investigation. The investigation which resulted in this proceeding was in fact then pending. Former rule 406 states that proposed stipulations "shall set forth . . . [¶] (vi) the disposition to be made of other pending investigations . . . ." In *Smith v. State Bar* (1985) 38 Cal.3d 525 the Supreme Court specifically addressed the effect on the validity of a stipulation of other unmentioned pending investigations. It rejected the petitioner's claim of prejudice because he was aware of the pending investigation at a point when he could

have taken steps to withdraw or modify the stipulation. The Court nonetheless stated that "the State Bar is strongly encouraged to inform an attorney that other complaints have been received before the attorney enters into stipulations which he or she might expect will dispose of all pending disciplinary matters." (*Id.* at p. 533, fn. 7.)

[2c] No explanation appears in this record for the State Bar's failure to mention the pending investigation into the Lauritas' complaint in the stipulation disposing of the matters set forth in 83-O-11550. Nonetheless, unlike the situation in *Smith v. State Bar*, *supra*, respondent had been notified of the Lauritas' complaint before he entered into the stipulation in 83-O-11550 by letters from the investigator in June and July of 1987 (State Bar exhibits 13 and 15) and again by letter in December of 1987 (State Bar exhibit 16). Thus, no prejudice has been demonstrated from the failure to include the pendency of this action in the stipulation in 83-O-11550. [1b] Nor has prejudice been established by the delay of proceedings in this case. The fire did not occur until a year and five months after respondent promised to check his files to respond to the State Bar complaint. If he had attempted to retrieve his files promptly, the files presumably would still have been intact.

### The Standard of Review

[3a] The standard of review applied by the Supreme Court and the applicable standard in the Review Department of the State Bar Court is independent review of the record, giving deference to credibility determinations of the hearing judge. In the Supreme Court upon review of a decision recommending disbarment or suspension, "the burden is upon the [attorney] to show wherein the decision or action is erroneous or unlawful." (Bus. & Prof. Code, § 6083 (c).) "In meeting this burden [the attorney] must demonstrate that the charges are not sustained by convincing proof and to a reasonable certainty." (*Lee v. State Bar* (1970) 2 Cal.3d 927, 939; see also *Calvert v. State Bar* (1991) 54 Cal.3d 765, 781.)

1. The current Rules of Professional Conduct became operative on May 27, 1989. Former rule 8-101(B)(3) was readopted as rule 4-100(B)(3) and former rule 6-101(A)(2) was re-

adopted as rule 3-110(A). All further references to the Rules of Professional Conduct herein are to the rules in effect during the period January 1, 1975, through May 26, 1989.

[3b] No similar burden of showing error is placed on the respondent in seeking review before the review department under Business and Professions Code section 6086.65 (d) or any other authority. "In all matters before the review department, that department shall independently review the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department." (Rule 453, Trans. Rules Proc. of State Bar.) In making our own independent determination whether there is clear and convincing evidence to support culpability of the charges, we must give great weight to findings of the hearing judge resolving issues pertaining to testimony. (*Id.*) In so doing, however, we also take into account the hearing judge's evaluation of the believed witness's general credibility. (Cf. *Lubetzky v. State Bar* (1991) 54 Cal.3d 308, 312.)

The examiner relies principally on *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 931 as establishing a more deferential standard on review. There, the Supreme Court repeated the statement it has sometimes included in its opinions in disciplinary cases that the petitioner bears the burden on review before the Supreme Court of showing that the findings were unsupported by substantial evidence. (See also *Harris v. State Bar* (1990) 51 Cal.3d 1082, 1087.) But the Supreme Court has never considered this burden on the petitioner to lower the standard of proof required to uphold culpability of the State Bar charges. Thus, the Court in *Van Sloten* cited to *Dixon v. State Bar* (1982) 32 Cal.3d 728, which explained that the petitioner's burden in this regard is to demonstrate lack of convincing proof to a reasonable certainty. (*Id.* at p. 736, citing *Himmel v. State Bar* (1971) 4 Cal.3d 786, 794.) Like respondent, Van Sloten contended on review that the State Bar's witness displayed a poor recollection and repeatedly contradicted herself. But Van Sloten only pointed to one minor testimonial inconsistency (*Van Sloten, supra*, 48 Cal.3d at p. 930) and the charge of abandoning the client was held supported by Van Sloten's admitted failure either to proceed with the case or to withdraw. (*Id.* at p. 931.) However, the Supreme Court, in

independently reviewing the record, did accept Van Sloten's claim that his inaction was based on an honest belief that he was not obligated to act and therefore gave little weight to a finding in aggravation made by the volunteer review department and reduced the amount of discipline accordingly from two years stayed suspension to a six-month stayed suspension. (*Id.* at p. 933.)

[4] *Van Sloten v. State Bar, supra*, thus is an example of a case in which disregarded testimony providing a plausible explanation of the respondent's conduct was considered by the Supreme Court on de novo review as evidence that adverse findings by the original fact finder were not supported by clear and convincing evidence. The Supreme Court also has repeatedly stated that, when it conducts its own independent review of the record, it resolves "all reasonable doubts in favor of the accused and if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." (*Lee v. State Bar, supra*, 2 Cal.3d at p. 939; see also *Zitny v. State Bar* (1966) 64 Cal.2d 787, 790; cf. *Lubetzky v. State Bar, supra*, 54 Cal.3d at p. 318.) We do the same in conducting our intermediate de novo review of the record.

#### The Findings Below

The respondent does not challenge most of the evidentiary findings set forth in findings 1-17, 20-22, and 25-33 of the decision below. His primary focus on review is the asserted lack of evidentiary support for certain findings set forth in paragraphs 18 and 19 and the findings set forth in paragraphs 23, 24, 34 and 35 of the hearing judge's decision.

#### Undisputed Facts

Respondent was a longtime family friend of the Laurita family and was once engaged to one of their five daughters. He performed various legal services over the years for which no bill was sent.<sup>2</sup> Mr. Laurita

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2. Respondent testified that he sent one bill to one of the daughters for services not at issue here, but it was never paid.

was always the spokesperson for his family in handling legal matters. Mr. and Mrs. Laurita went through bankruptcy in 1984 and had continuing financial problems thereafter. When the issue of respondent's fees occasionally came up, respondent told Mr. Laurita not to worry about it. Mr. Laurita expected to sit down one day with respondent and make an arrangement to pay for the legal services respondent performed for his family. Mr. Laurita's testimony was in accord with respondent's testimony and the documentary evidence that from December of 1983 to June of 1986, respondent performed nearly 100 hours of work reflecting over \$13,000 worth of services for the Lauritas in connection with the modification of a note and deed of trust for the benefit of Dana Laurita, one of their adult daughters (the Kanama matter),<sup>3</sup> consultation regarding Mr. and Mrs. Laurita's bankruptcy and regarding the effect of the Kanamas' bankruptcy on Dana's note, and representation of the Lauritas in an adversary proceeding in their bankruptcy (the Abramovitch complaint).

#### The Personal Injury Suit

In addition to the above services, respondent was hired in 1984 to handle a personal injury case on a contingent fee for Dana Laurita, who had been in a minor automobile accident in June of 1984. That case settled for \$1,800 in July of 1986. Respondent was found by the hearing judge to be entitled to a one-third contingency fee of \$600 and reimbursement of

\$100 in expenses which he received out of the settlement funds.<sup>4</sup> [5 - see fn. 4] Mr. Laurita signed Dana's name to the release and settlement check for \$1,800 from the insurance company and gave them to respondent. The State Bar stipulated that Dana authorized her father to act on her behalf in dealing with respondent in bringing that case and that all of Mr. Laurita's actions were in fact authorized by Dana. Respondent took the entire \$1,800 and placed it in a personal account for his own use.

The Lauritas complained to the State Bar and were advised to file a small claims action. The respondent found a copy of the small claims complaint on his doorstep but never appeared to defend the action, and a judgment for \$1,100 was obtained against him in early 1987.<sup>5</sup> The judgment was served by mail on respondent who testified that he met with Mr. Laurita and a new attorney representing Mr. Laurita for three hours in September of 1987 primarily on another matter, but also on this matter.<sup>6</sup> [6 - see fn. 6] Respondent further testified that at that meeting he explained to the new attorney that he was authorized by Mr. Laurita to apply the \$1,100 to outstanding services. Respondent also offered testimony that Mr. Laurita disclaimed responsibility for the State Bar complaint and shook hands with respondent at the end of the meeting<sup>7</sup> [7 - see fn. 7] and that, based on that meeting, respondent believed the State Bar complaint would not be pursued. No collection efforts were thereafter undertaken on the small claims judgment. It remained unpaid until December

3. The note and deed of trust were intended as partial repayment to Dana Laurita for contributing her earnings as a child actress to her family's living expenses.

4. [5] Mr. Laurita testified that respondent was to receive a 40 percent contingency. Respondent testified that it was one-third. The agreement was not in writing as required by Business and Professions Code section 6147, rendering it voidable at the option of the plaintiff in which case respondent would be entitled to a reasonable fee. The time value of his services in the case exceeded the fee earned under either contingency.

5. Respondent testified that he believed the complaint to have been improperly served, that he was out of state at the time of the hearing and that after receiving the judgment he intended to move to set it aside but never got around to doing so.

6. [6] The hearing judge made no reference to the testimony regarding this September meeting in her findings. Where the respondent's testimony is plausible and uncontradicted, it "should be regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered." (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 543; see also *Davidson v. State Bar* (1976) 17 Cal.3d 570, 574.)

7. [7] The hearing judge sustained the examiner's objection to respondent's testimony as to statements made by Mr. Laurita at the September meeting. (R.T. 792.) This was error. (*Calvert v. State Bar* (1991) 54 Cal.3d 675, 777.) Mr. Laurita was asked about the meeting on cross-examination and said he could not recall it. Evidence Code sections 770 and 1235 permit evidence of a statement made by a witness if he is given an opportunity to explain or deny it. The witness had that opportunity.

of 1989 when, after notifying the State Bar prosecutor that he wanted to meet with the Lauritas and inviting the prosecutor to be present, respondent paid the judgment plus \$400 in interest to Dana Laurita at a meeting with Dana and Michael Laurita. Afterward, the Lauritas declined to be deposed and sought to have the State Bar complaint dismissed.

#### Objections to the Client's Testimony

Respondent objected to numerous questions put to Dana Laurita on direct examination by the examiner as calling for hearsay and to others as leading the witness. The hearing judge overruled the hearsay objection to consider the answers for state of mind. (R.T. pp. 46, 69-71, 81, 84.) Respondent took exception to these rulings on the basis that Dana Laurita's state of mind was not relevant to the proceeding. The judge also overruled respondent's objection to leading questions on direct examination, stating that she was giving the examiner leeway because the witness had demonstrated an unclear memory. (R.T. p. 67.) This is also challenged as an abuse of discretion.

[8] While the examiner indicated in his pretrial brief that he might seek to call Dana Laurita under Evidence Code section 776, at trial he never asked the court to declare her a hostile witness and no such finding was made. "The dangers of improper suggestion are obvious, and [leading] questions are normally excluded on direct examination." (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1820, p. 1779.) Evidence of a witness's mental state is also properly excluded if not relevant. (See generally 1 Witkin, *supra*, The Hearsay Rule, § 596, p. 569.) However, as noted in *People v. Nealy* (1991) 228 Cal.App.3d 447, 452, evidence properly excludible under a vague "state of mind" argument may in fact be admissible under another, more precise theory. Even assuming *arguendo* that the judge erred in these rulings, however, no prejudice appears because Dana Laurita's sketchy testimony was clearly insufficient to establish the State Bar's case and was not relied upon by the hearing judge in the challenged findings.

Dana Laurita testified to the accident she experienced in June of 1984 and the oral authorization she gave her father to take care of everything for her. She testified that she knew respondent most of her life and hired respondent to represent her; that she did not remember if she met with respondent on this case, what the fee arrangement was or what it settled for except her father told her at some point that "maybe I was going to get \$1,100 back. . . . Something to that effect." (R.T. p. 58.) Exhibit 19 was shown to her—a letter purportedly written by her to complain to the State Bar that she never received her share of the proceeds of the settlement of the personal injury action. It did not refresh her recollection. She testified that it was her father's handwriting and that he had full power of attorney "for all my dealings" as well as "regarding this case." (R.T. pp. 57-58.) This included the ability to act without consulting her. She also testified that the two signatures (witness and releasing party) on the release (State Bar exh. 9) were both her father's handwriting, as was her purported signature on the back of the settlement check. (State Bar exh. 10.)

After getting her father's advice she signed the small claims complaint (State Bar exh. 12) and appeared with her father at the small claims court. He gave evidence;<sup>8</sup> she did not recall if she talked at all and did not remember the result of the small claims action. She received \$1,500 from respondent by check in December of 1989 at a meeting at her sister's home, but she did not recall what she said or he said. Her father mostly spoke with respondent. She did not remember whether from June of 1986 through the date of trial she ever instructed her father to tell respondent that he should apply any portion of the settlement proceeds to legal fees her family may have owed to respondent.

#### The Challenged Findings

The central issue below was whether respondent was authorized by the client's father, Michael Laurita, to take the client's share of the personal injury settlement (\$1,100) in satisfaction of the Lauritas'

8. This testimony directly contradicted her father's testimony that Dana Laurita presented all of the evidence at the small

claims court and that he just sat in the back as an observer. The hearing judge did not address this conflict in their testimony.

obligation to pay for past legal services. Respondent testified that he had orally agreed with Mr. Laurita on several occasions that when the personal injury action settled respondent could pay himself for his prior services. Mr. Laurita testified that until the trial he had forgotten that he had orally agreed in 1985 to the payment of the Kanama fees out of the contemplated recovery in the personal injury action and had followed that discussion with written authorization. The trial judge disbelieved the testimony of both witnesses on this point because she was unable to square it with circumstantial evidence of their conduct in 1986 and 1987 and other testimony of Mr. Laurita. As indicated above, a key issue is whether the hearing judge found that the written authorization (exhibit F) was fabricated, as urged by the examiner in his post-hearing brief below. The challenged findings and a summary of the evidence with respect to each are set forth below.

#### Findings 18 and 19

Based solely on excerpts from Michael Laurita's testimony, the hearing judge found as follows: "18. Sometime prior to August 1, 1986, Respondent advised Mr. Laurita that he had settled Dana Laurita's claim. On August 1, 1986, Mr. Laurita met Respondent at the courthouse in Van Nuys and signed his daughter Dana's name to both the release of claims and settlement draft. Mr. Laurita was in a hurry and did not closely examine the documents because he trusted Respondent. Only Respondent and Mr. Laurita were present at the time that these documents were signed. Mr. Laurita believed at the time that the settlement was \$2,000 because Respondent had previously advised him that he believed he could settle Dana's claim for approximately that figure. (1 R.T. 171:2-173:5, 174:4-6, 2 R.T. 242:20-243:13, 3 R.T. 414:15-415:3 (Testimony of Michael Laurita).) [¶] 19. Mr. Laurita told Respondent at the courthouse to deduct the fees and expenses that were due to him and to send the rest of the settlement proceeds to

Dana. Mr. Laurita understood that Dana's share of the settlement proceeds amounted to \$1,100. (2 R.T. 243:15-18, 3 R.T. 443:16-444:11, 446:23-447:9 (Testimony of Michael Laurita).)" (Decision, pp. 13-14, fns. omitted.)

#### Hearing Judge's Statements Regarding Michael Laurita's Credibility

In crediting Mr. Laurita's version of the events at the courthouse on August 1, 1986, the hearing judge nonetheless stated on the record that Mr. Laurita had serious credibility and memory problems. (R.T. pp. 455, 459.) The record also reflected that Mr. Laurita, who was 71 years old when he testified, had a hearing problem which was diagnosed in 1984 or 1985. (R.T. p. 226.) In summarizing Mr. Laurita's testimony in its entirety after the case was submitted on the issue of culpability, the hearing judge stated: "[I]t appeared to me that Mr. Laurita's character is one of swaying whichever way the wind blows at the moment to absolve himself of any wrongdoing." (R.T. p. 874.)

Indeed, in crediting Mr. Laurita's cited testimony in making findings 18 and 19, the hearing judge had to reject contradictory testimony of the same witness. Mr. Laurita testified elsewhere upon cross-examination that respondent never told him that Dana would receive \$1,100 from the settlement. (R.T. p. 379.)<sup>9</sup> That was just an unstated assumption on Mr. Laurita's part. (R.T. pp. 380-381.) The hearing judge made no reference in her decision to this testimony, although she did expressly reject the credibility of Mr. Laurita's testimony on February 2, 1990. On that date, Mr. Laurita testified that he had previously authorized respondent to take fees out of the personal injury recovery to compensate respondent for his handling of the Kanama matter and authenticated a note he had sent to respondent in 1985 (exh. F) confirming that authorization. The hearing judge placed no reliance on this exhibit, but

9. As he did with Dana Laurita's testimony, respondent raised a standing objection to the admissibility of testimony of Mr. Laurita's understanding that Dana would get \$1,100 and other testimony as to his state of mind. In light of our conclusion that

the record, including such challenged testimony, did not support culpability of the charges on which such testimony was admitted, we do not need to determine this issue.

admitted it into evidence. (See discussion *post.*) Mr. Laurita testified that until he was shown his prior written authorization at trial he had forgotten about the prior authorization. On a previous day of trial, he testified that he was completely satisfied as of the hearing that there had been a misunderstanding and no misappropriation by respondent. (R.T. pp. 220-221, 288.)

#### Other Evidence with Respect to the Facts Underlying Findings 18 and 19

In making findings 18 and 19, the hearing judge rejected respondent's testimony that he handed the settlement documents to Mr. Laurita at the courthouse and instructed him to get Dana's signature on the release and settlement check and that Mr. Laurita returned several hours later with the signed documents; that respondent was unaware that Mr. Laurita signed his daughter's name to both documents; that Mr. Laurita reaffirmed his prior agreement that respondent could pay himself for other services rendered the family out of the client's share of the recovery; and that respondent promised to send the Lauritas a statement of all services to which the funds would be applied. Respondent testified that he then sent the Lauritas a detailed statement (State Bar ex. 23) and cover letter three days later listing more than \$15,000 in services rendered, including the hours spent on the personal injury case. The hearing judge accepted exhibit 23 into evidence, but made no express determination that it was sent as respondent testified. (See decision, p. 19, finding 33.)

The decision below also does not address the import of Mr. Laurita's admission that he signed Dana's name to the release and settlement check. The purported signatures were improper whether he wrote them in a hurry without realizing what the documents were, as he testified, or whether he did so after several hours had lapsed, as respondent testified. Mr. Laurita had no written power of attorney at the time of signing these documents. (See Code Civ. Proc., § 2475.) Although Dana Laurita testified and the State Bar stipulated that Mr. Laurita at all times was authorized by his daughter to act on her behalf, the insurance company sought Dana's signature on both documents and was never notified that Dana Laurita's signature on the release and settlement

were actually written by her father. Respondent urged below that Mr. Laurita could have been accused of forgery and therefore had a strong motivation to testify falsely that he signed the documents hurriedly without knowing what they were. Evidence was also introduced by the State Bar that Mr. Laurita had earlier represented to the State Bar and the insurance company that he *never* saw the settlement check which—unbeknownst at the time to both entities—he had in fact executed in his daughter's name.

Even accepting the finding that Mr. Laurita signed the papers in a hurry, his testimony that he did not know what they were is not credible. (Cf. *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 155-156.) Both he and respondent testified, and the hearing judge found, that respondent met Mr. Laurita at the courthouse after respondent had informed Mr. Laurita that he had finally settled the personal injury case. No other reason for meeting on that date was ever offered into evidence except to get the release and settlement check signed. The release handed to Mr. Laurita by respondent stated in bold print right above the signature line that "THE UNDERSIGNED HAS READ THE ABOVE AND FULLY UNDERSTANDS IT TO BE A FULL AND FINAL RELEASE OF ALL CLAIMS." It provided for the signature of the releasing party on the right and of a witness and the witness's address on the left. Mr. Laurita signed his own name on the witness line and wrote his daughter's name on the signature line. (State Bar ex. 9.) The check itself was signed on the back "Dana Laurita." The court accepted Mr. Laurita's testimony that respondent was told by Mr. Laurita at the courthouse to deduct his fees and send the remainder to Dana. This had to be predicated on respondent cashing the settlement check and paying himself his contingent fee and cost reimbursement. The hearing judge made no finding as to whether Mr. Laurita knew what he was signing. We find, under the circumstances, that Mr. Laurita had to be aware that the documents he signed were the release and settlement check.

[9a] Respondent also raises on review the hearing judge's ruling sustaining the examiner's objection to respondent's testimony as to statements made by Mr. Laurita at the courthouse on August 1, 1986, which were offered for impeachment. (Cf. *Calvert v.*

*State Bar, supra*, 54 Cal.3d at p. 777 [error to refuse to allow impeachment of State Bar witness].) The examiner objected on grounds of hearsay, and on the grounds that Mr. Laurita was not asked about the particular alleged statements on cross-examination when Mr. Laurita testified about the conversation at the courthouse. (See Evid. Code, § 770.) Respondent asked the court to bring Mr. Laurita back for further questioning which the court had already indicated it would do if necessary when Mr. Laurita was excused. (R.T. p. 524.) The court declined to permit respondent to testify to the alleged statements or to recall Mr. Laurita.

[10] Although these proceedings are unique—not criminal, civil or administrative (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300)—respondent is entitled to the same guarantee of a fair hearing. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 633-634.) “One of the elements of a fair trial is the right to offer relevant and competent evidence on a material issue. . . . [D]enial of this fundamental right is almost always considered reversible error.” (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1681, p. 1642.) [9b] The impeachment testimony offered by respondent was on a crucial issue in the case and the witness he sought to impeach—Mr. Laurita—had not been completely excused from giving any further testimony in the action. The Law Revision Commission comment to Evidence Code section 770 states in pertinent part that “unless the interests of justice otherwise require, Section 770 permits the judge to exclude evidence of an inconsistent statement only if the witness . . . has been unconditionally excused and is not subject to being recalled as a witness.” (See Cal. Law Revision Com. com., West’s Ann. Evid. Code, § 770, p. 123.) On the other hand, the interests of justice exception was arguably met. The culpability phase of the hearing had already lasted far longer than had been anticipated which the hearing judge attributed in large part to unnecessary prolongation of the proceedings by respondent and respondent provided no explanation for his failure to cross-examine Mr. Laurita regarding these particular alleged inconsistent statements.

In any event, even on the record as it stands without the excluded testimony, we find no clear and

convincing evidence that Mr. Laurita instructed respondent to send the balance of the settlement proceeds to Dana, since Mr. Laurita himself testified to the contrary at a later point in his testimony. When he was asked subsequently while still on direct examination whether he told respondent how he should disburse the settlement proceeds in Dana’s case Mr. Laurita testified: “No. I didn’t tell him how. I told him to disburse—to take care of all—.” (R.T. p. 314.) This different version of the conversation given by Mr. Laurita on the second day of the hearing was not addressed by the hearing judge in her decision.

Evidence Code section 780 sets forth the general rules for establishing the credibility of a witness, including the following: “(c) The extent of his capacity to perceive, to recollect or to communicate any matter to which he testifies. . . . [9] (f) The existence or non-existence of a bias, interest or other motive. . . . [9] (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. [9] (i) The existence or non-existence of any fact testified by him.”

[11] Even on a cold record, Michael Laurita cannot be considered a convincing witness under these criteria. (Cf. *Lubetzky v. State Bar, supra*, 54 Cal.3d at p. 322.) In *Lubetzky*, the hearing panel itself noted that the testimony of the State Bar’s chief witness was substantially “impeached and discredited.” (*Ibid.*) Here, too, the trial judge noted that Mr. Laurita, the State Bar’s chief witness, exhibited a poor memory and repeatedly testified inconsistently on key issues. He admittedly signed his daughter’s name to legal documents and letters without disclosing his role as agent, thereby misrepresenting material facts to the insurance company and the State Bar. Moreover, almost all of the “facts” he asserted in his letters to the State Bar were proved untrue at the hearing or contradicted by his own testimony at the hearing. He also admitted to being motivated by great anger and severe emotional and economic stress at the time he accused respondent of stealing his daughter’s money. We are simply unpersuaded that those parts of findings 18 and 19 which are based solely on selected portions of Mr. Laurita’s inconsistent testimony are supported by clear and convincing evidence in light of the record as a whole. (See *Zitny*

v. *State Bar*, *supra*, 64 Cal.2d at p. 790; *Davidson v. State Bar*, *supra*, 17 Cal.3d at p. 574; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 725-726; *Lubetzky v. State Bar*, *supra*, 54 Cal.3d at p. 324.)

#### Findings 23 and 24

Based on other portions of trial testimony of Michael Laurita and his unsworn letters to the State Bar (State Bar exhibits 19 and 20), the hearing judge found as follows: "23. When Dana's share of the proceeds from the settlement had not arrived within a couple of weeks, Mr. Laurita telephoned Respondent and asked him about the money. Respondent told Mr. Laurita that he had mailed Dana a check but that it must have been lost in the mail. Respondent promised to cancel the check at the bank and send a second check to Dana, but he didn't do so. (1 R.T. 178:16-179:3, 2 R.T. 231:23-232:14, 234:5-13, 303:19-305:5 (Testimony of Michael Laurita); State Bar Exhibit 20.) [¶] 24. Mr. Laurita had only one or two conversations with Respondent after August 1, 1986 regarding Respondent's failure to transmit Dana's share of the settlement proceeds. Each of these conversations occurred shortly after the case was settled. Thereafter, the communications ceased. (2 R.T. 226:23-228:10, 3 R.T. 522:3-22 (Testimony of Michael Laurita); State Bar Exhibit 19.)" (Decision, pp. 14-15, fn. omitted.)

#### State Bar Exhibits 19 and 20

State Bar exhibit 19, the handwritten letter addressed to the State Bar dated March 19, 1987, purportedly written by Dana Laurita, was objected to by respondent as hearsay but he later withdrew his objection to the document's admissibility for purposes of impeachment or any other purpose. The letter asserted that respondent settled Dana Laurita's personal injury action for a proposed sum of \$1,800 on July 24, 1986, and further stated in pertinent part: "He said his fee was 40% plus \$100 for expenses and the balance of \$1100 would be due me. I never saw the check and to this day have never received the \$1100. My dad questioned him around August of '86 and Cacioppo said he mailed a certified check but it was lost in the mail. He claimed he would have to go to the bank and reissue another check. That was the

last correspondence we had with Richard Cacioppo. [signed] Dana Laurita."

[12a] No deference is due the hearing judge's reliance on this letter since it was not testimony but documentary evidence. (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90.) We conclude that it is highly unreliable evidence. First of all, it is internally inconsistent. If respondent's fee was 40 percent of \$1,800 then he would have been entitled to \$720 in fees plus \$100 for expenses, leaving a balance due the client of \$980, not \$1,100. Dana Laurita's memory was not refreshed by exhibit 19 and she had no recollection of the facts it recited. The hearing judge found that the contingency was 33 1/3 percent as testified to by respondent, not 40 percent as set forth in the letter; that Mr. Laurita wrote exhibit 19 and that, contrary to the statement in the letter, its author had in fact signed the check which was presented to him at the courthouse.

The examiner conceded at oral argument that, as an unsworn statement, the letter would have been inadmissible hearsay if it had not been authenticated at trial. It was not written at the time of the events, was self-serving, was not under oath and purported to be written by someone other than its author. The document recited as facts certain information, discussed above, which was contrary to findings made at the hearing. Moreover, its author, Mr. Laurita, when placed under oath, testified inconsistently as to all of the key allegations against respondent set forth in the document except the admitted fact that the \$1,100 was not received by Dana Laurita. Exhibit 19 was properly admitted for impeachment of its author (Evid. Code, § 1235) but did not provide clear and convincing proof to the contrary of his testimony and that of respondent.

[12b] Nor is any deference due the hearing judge's reliance on exhibit 20. Exhibit 20 was written July 4, 1987, in Mr. Laurita's own name. It is a four-page handwritten letter which, like exhibit 19, would have been inadmissible hearsay had not its author testified at trial, making it admissible for impeachment of his testimony. The examiner took Mr. Laurita through the letter line by line and Mr. Laurita retracted almost every accusatory statement

in the letter, claiming that he believed it to be true at the time, but had since realized that it was not. In fact, he admitted that he knew one accusation to be false at the time he wrote the letter. One of the main concerns voiced in the letter was regarding a commission Mr. Laurita claimed for sale of a house in probate which respondent, as attorney for the estate, had arranged for Mr. Laurita to occupy and offer for sale. Mr. Laurita stated in the letter to the State Bar that his commission amounted to a minimum of \$2,000 and concluded "Richard Cacioppo owes me! I or my daughter Dana owe him nothing!!!" (State Bar exh. 20.) Respondent testified that respondent had deliberately steered clear of the dispute between Mr. Laurita and the administratrix of the estate. At trial, Mr. Laurita admitted that he "always knew" that respondent was not responsible for the money he claimed from the estate. (R.T. p. 377, emphasis added; see also *id.*, pp. 376-377.)

In finding 24, the hearing judge found that Mr. Laurita had only one or two conversations with respondent shortly after the settlement. Yet in finding 23, she relied on exhibit 20 which in part stated that: "After a week or so, when the check had not arrived, I contacted Richard and advised him that I had not received the check for Dana. He claimed it must have been lost in the mail and that he would go to the bank to cancel that check and re-issue another. *For the next three months we corresponded by mail, we talked in person and by telephone. The excuse was always the same, he couldn't get to the bank. Since then there has been no contact.*" (Exh. 20, emphasis added.) In finding 24, the hearing judge thus rejected the truth of these statements of Mr. Laurita in exhibit 20 describing numerous conversations she found never took place and correspondence which did not exist.

#### Other Evidence Pertaining to the Facts Underlying Findings 23 and 24

In contrast to the testimony of Mr. Laurita cited in finding 23 that respondent had promised him a check for Dana, Mr. Laurita changed his testimony at a later point on direct examination stating: "I can't remember this very clearly, but he said to the effect [sic] that he was sending *something* in the mail to me." (R.T. p. 232, emphasis added.) This was not

inconsistent with respondent's testimony that he had promised to send and did immediately prepare and send an invoice for the legal services to which the \$1,100 was applied. (State Bar exh. 23.) Later on cross-examination, Mr. Laurita testified that he had no independent recollection of respondent ever telling him that he had mailed him a check for Dana and it was lost in the mail. (R.T. p. 422.) The Lauritas also testified that they had just moved from the address to which the invoice and cover letter were addressed, had not told respondent of their move and did not receive the invoice. Mr. Laurita testified that he and his daughter lost a good deal of mail during this period. The hearing judge admitted the invoice into evidence, but made no finding as to whether it was in fact sent.

[12c] We cannot conclude that findings 23 and 24, which rely solely on selected testimony of Mr. Laurita and his prior hearsay statements to the State Bar, are supported by clear and convincing evidence in the record as a whole, given the lack of trustworthiness of the "facts" set forth in the hearsay statement and the repeated contradictory testimony from the same witness.

#### Findings 34 and 35

The hearing judge concluded her findings as follows: "34. The Court finds that there is conflicting testimonial and documentary evidence regarding whether Respondent had authority from the Lauritas to apply the proceeds from Dana's settlement to Respondent's attorney fees in other matters. The Court resolves these conflicts in the testimony by finding that neither Respondent's nor Mr. Laurita's February 2, 1990 testimony regarding such authorization were credible and that, in fact, Respondent had not been authorized by either Michael or Dana Laurita to apply Dana's share of the proceeds to any attorney fees that may have been owed to Respondent by the Lauritas in other matters. [¶] 35. Respondent misappropriated Dana Laurita's share of the settlement proceeds from the action entitled *Laurita v. Doheny*, L.A. Super. Ct. Case No. NWC 09260, in the amount of \$1,100." (Decision, pp. 19-20.)

In making findings 34 and 35, the hearing judge cited no evidence on which she affirmatively relied

in finding misappropriation and appeared to place the burden on respondent to prove his authority to apply the funds to other legal services he had rendered the Laurita rather than on the State Bar to prove lack of such authority. She also did not address testimony of authorization on other dates besides February 2 on which both witnesses gave testimony. There were seven days of proceedings in the culpability phase of the hearings—January 17, January 18, February 2, March 1, March 22, April 16 and May 8, 1990. On the second day of the hearing—January 18—Mr. Laurita testified that there was a misunderstanding and he believed that no misappropriation had occurred. Respondent described the authority he received not only on February 2, but also in his testimony on subsequent days.

[13] Assuming the hearing judge disbelieved all of the testimony of Mr. Laurita and of respondent on this issue, the hearing judge was left with no witnesses who testified to the facts on which she found culpability. Even if their testimony was not worthy of belief “it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.” (*Edmondson v. State Bar, supra*, 29 Cal.3d at p. 343.) [14] Assuming the hearing judge believed selected parts of inconsistent testimony of Mr. Laurita, it was still the State Bar’s burden to prove culpability by clear and convincing evidence. Where the respondent’s version is plausible, even when controverted, it supports a reasonable inference of lack of misconduct. (*Davidson v. State Bar, supra*, 17 Cal.3d at pp. 573-574.) It is not implausible that respondent was authorized to take \$1,100 in satisfaction of over \$13,000 in previously rendered legal services, particularly in light of exhibit F which the hearing judge admitted into evidence after it was authenticated by its author.

#### Exhibit F

On cross-examination on February 2, 1990, Mr. Laurita was shown respondent’s exhibit F, a copy of a note dated June 6, 1985. Exhibit F reads as follows: “June 6, 1985, Rich: Please file Dana’s complaint and take out of the settlement anything we owe you for the work you did for us on the Kanama matter. I’ll try to get you the filing fee soon. [signed] Mickey Laurita.” The examiner originally objected to the

document under the best evidence rule (R.T. p. 449), but withdrew any objection and let respondent lay a foundation for the document. (R.T. pp. 461-462.) Mr. Laurita testified that he had not seen the document since June of 1985, but that he had typed and signed it and delivered it to respondent’s office after writing respondent’s name on it. (R.T. pp. 452, 463-469.) He also testified that the note refreshed his recollection of the conversation he had with respondent on August 1, 1986, and that they had discussed that respondent had authority to take monies due him out of the personal injury recovery. (R.T. pp. 464-465.)

[15a] Documents must be authenticated before they can be introduced into evidence. (Evid. Code, § 1401, subd. (a); see 2 Witkin, Cal. Evidence (3d ed. 1986) Documentary Evidence, § 903, p. 869, and cases cited therein.) Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law. (Evid. Code, § 1400.) By admitting exhibit F into evidence, the hearing judge initially had concluded that there was sufficient evidence that it was what it was claimed to be.

On the last day of the culpability phase of the hearing, the examiner indicated that he was going to argue that exhibit F was fabricated by respondent for the State Bar proceedings. (R.T. p. 865.) In response, the judge stated that the wording of exhibit F was more suggestive of the way Michael Laurita did business than suggestive of a fabrication; she expressed doubt as to whether there was clear and convincing evidence of culpability of misappropriation and tentatively concluded that “the only way” that “all of the evidence can be harmonized and made plausible” was to assume that Mr. Laurita did authorize respondent to take the money but that it was done without sufficient information and in derogation of the rights of the true client—Dana Laurita. (R.T. pp. 875-880.) The hearing judge asked both parties to address this hypothesis in post-hearing briefs, noting that under this scenario, a breach of fiduciary duty may have occurred, but that “it’s probably not a misappropriation; it’s something else.” (R.T. p. 884.) She also indicated that until the briefs were received

she had not decided the case and was not wedded to this view of the evidence. (R.T. p. 880.)

The examiner urges on review that the hearing judge impliedly found in her decision filed in August of 1991 that exhibit F was fabricated. There is language in her decision suggestive of grave misgivings about exhibit F. At pages 33-35, she states that "the Court finds it inconceivable that Respondent simply 'forgot' about the existence of such a crucial piece of evidence and is suspicious of Respondent's explanation that he happened to find it in the file of a largely unrelated probate case." But this suspicion falls short of a determination that the document was in fact fabricated which depended not only on disbelief of respondent's and Mr. Laurita's testimony but of a belated conspiracy between them to commit perjury and defraud the court with false evidence. Indeed, although the hearing judge also characterized exhibit 23 as "suspicious," the examiner does not argue that it was fabricated. Fabrication of evidence is a very serious charge. (See *Friedman v. State Bar* (1990) 50 Cal.3d 235, 243.) There, disbarment was recommended by the former volunteer review department for misappropriation, coupled with perjury and attempt to manufacture evidence. Three years actual suspension was ordered in lieu of disbarment only because of a 20-year blemish-free prior record and a determination that the conduct was aberrational.

[15b] By allowing exhibit F to be admitted as an authenticated exhibit in the record and not offering affirmative evidence of fabrication, the examiner provides us with no basis to find that the document was in fact fabricated. [16a] Thus, even taking into account the hearing judge's misgivings about exhibit F, we have to independently weigh exhibit F and exhibit 23 and exhibits 19 and 20 all of which constitute conflicting documentary evidence.

[16b] Given the judge's statement as to the unreliability and inconsistency of Mr. Laurita's testimony, and the record taken as a whole, we cannot independently conclude that there is clear and convincing evidence in the record to support findings 23, 24, 34 and 35. Indeed, as noted above, the hearing judge, when she was closest to the facts, voiced the same tentative assessment of the evidence as we

conclude here. While we do not attempt to resolve the evidentiary conflicts in the record at this stage of the proceedings, we find that the State Bar simply was unable to meet its burden by clear and convincing evidence to a reasonable certainty. (*Calvert v. State Bar, supra*, 54 Cal.3d 765, 781; *Zitny v. State Bar, supra*, 64 Cal.2d at p. 790.)

#### Alleged Violation of Section 6106

In light of the absence of clear and convincing evidence that respondent was not authorized in taking the \$1,100 or that he lied to Mr. Laurita about sending a check to Dana, no violation of Business and Professions Code section 6106 was proved.

#### Alleged Violation of Rule 8-101(A)

Since there is no clear and convincing evidence to support findings 18, 19, 23, 24, 34 and 35, there is likewise no basis for concluding that respondent was ever obligated to put the funds in a trust account, since if he was authorized to apply the money to payment for his past services, it was proper for him to deposit the funds directly into his own family bank account.

#### Alleged Violation of Rule 8-101(B)(3)

The hearing judge never found that the invoice (exhibit 23) was not sent, she just concluded that it was "suspicious." She based her finding of a rule 8-101(B)(3) violation on her conclusion that "Respondent had an affirmative duty to appropriately account to his clients for the work that he had performed and for his handling and disposition of the settlement funds. Respondent failed to render such accounting . . . ." (Decision, pp. 27-28.)

[17a] As noted above, the State Bar does not assert on review that the invoice was fabricated after the fact as it asserts with respect to exhibit F. Rather, the examiner argues that the invoice was an improper accounting because it included time spent on the contingency fee matter. The invoice stated the exact amount of billed time spent on each matter listed, the description of what services were rendered, and respondent's hourly rate. The time spent on the contingency case was separately listed under its own

case heading. It clearly should not have been included on the same invoice because it was covered by a separate contingent fee agreement. While it did not render the accounting for other services incomplete, it could have caused client confusion.

[17b] Of greater concern than the content of the accounting is its timing. Respondent testified that as a sole practitioner his billing practices were more informal than those of most lawyers, and that because the Lauritas were family friends, he was even more casual in handling this billing. This entire proceeding might have been avoided if respondent had followed a more orthodox billing procedure to ensure informed consent of the client to the application of her recovery to his fees. Respondent had never sent any prior bill to the Lauritas for these services and had performed only some of them for Dana Laurita and others exclusively for her parents. Although respondent was only seeking payment for a small percentage of the time value of his services, he still should have given the client and her father, as her representative, an opportunity to review the bill *before* he received authorization to pay himself out of Dana Laurita's recovery, not *after*. We agree with the hearing judge that respondent did not render an appropriate accounting to the client and therefore violated rule 8-101(B)(3). However, in light of the fact that more than \$1,100 in services were admittedly performed for Dana Laurita's benefit, and since she later received all of the money back through the small claims action, no significant harm resulted to the client.

#### Alleged Violation of Rule 8-101(B)(4)

The premise of the alleged violation of rule 8-101(B)(4) is the delay in payment to Dana Laurita. However, since there was insufficient evidence that respondent was unauthorized in taking the \$1,100 for fees he had earned, there is insufficient proof he acted improperly in putting the money to his own use.

#### Alleged Violation of Rule 6-101(A)(2)

The hearing judge found this violation on the basis of lack of adequate communication. As discussed above, she credited Mr. Laurita's testimony

that he contacted respondent within a couple of weeks after August 1, 1986, to ascertain why he had not received Dana's share of the proceeds. This was disputed by respondent, but it was undisputed that Mr. Laurita paid repeated visits to respondent's home in the fall of 1986, knocking loudly on the door late at night. Respondent testified that he thought Mr. Laurita's visits were for the purpose of blaming respondent for the administratrix's failure to pay Mr. Laurita for his services in repairing the house in probate which Mr. Laurita had rented and for the administratrix's alleged breach of an exclusive real estate brokerage agreement. Respondent admitted at the hearing that he sought to avoid any contact with Mr. Laurita on that dispute and that he did not thereafter have any contact with the Lauritas until the fall of 1987, after the State Bar investigation had commenced.

Even though the personal injury case had settled, respondent had a duty to communicate in response to any client concerns regarding the settlement distribution and belated accounting. Since he had never sent a billing in three years he should have expected that he might have to discuss the accounting with Mr. Laurita and should not have avoided him. Nevertheless, as of the fall of 1986, Dana Laurita had not communicated any concern to respondent regarding the application of the fees and Mr. Laurita's actions at that time might have been subject to misinterpretation. However, by January of 1987, respondent had no basis for attributing Mr. Laurita's unhappiness solely to an unrelated claim against the administratrix. Respondent admittedly received the Lauritas' small claims action in January 1987 alleging that Dana was entitled to the \$1,100 that he took from the personal injury settlement. Sometime during this period he also received a telephone call from the insurance agent reporting that the Lauritas had called him complaining they had not received the insurance check.

[18] Even if respondent justifiably relied on Mr. Laurita acting on Dana's behalf prior to January of 1987, when he received the small claims complaint and telephone call he was clearly put on notice that Dana apparently did not know about the use to which the settlement proceeds had been put. Thus, even crediting respondent's version of events, respondent

at that point had substantial reason to believe that Mr. Laurita's earlier acts might not have been authorized by his daughter. Respondent's duty to Dana Laurita as his client included a duty to communicate with her to ensure that her father had in fact been authorized to discharge the family's indebtedness for respondent's other fees out of the personal injury recovery. His failure to communicate supports the hearing judge's determination of a rule 6-101(A)(2) violation. (*Lister v. State Bar* (1990) 51 Cal.3d 1117, 1124-1126; *Layton v. State Bar* (1990) 50 Cal.3d 889, 904; *Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1149-1150.)

#### Alleged Violation of Rule 5-101

After the close of the culpability hearing the examiner moved to amend the notice to show cause to allege violation of rule 5-101 on the theory that if the court concluded that exhibit F was authentic, it evidenced an agreement between Michael Laurita and respondent whereby respondent obtained a pecuniary interest in the personal injury settlement adverse to Dana Laurita without her informed written consent. This amendment was predicated on colloquy between counsel and the judge during trial. Respondent answered, denying any violation of rule 5-101 and alleging, among other things, that the indebtedness to him was a joint obligation of both Lauritas, that Dana Laurita authorized Michael Laurita to represent her interests in these matters and that respondent reasonably believed all of Michael Laurita's actions were with the consent and knowledge of Dana Laurita. The hearing judge permitted the amendment, but in her decision, she found respondent not culpable of violating rule 5-101 because she found no authorization from Michael or Dana Laurita to apply the client's share of the settlement funds to any past legal fees. (Decision, pp. 21-22.) Since we find that there was evidence of authorization, we must revisit this issue.

Respondent testified that he considered both Dana and her parents to be the clients in the Kanama matter for which he had completed more than \$1,100 in services. Dana was admittedly the beneficiary of his efforts. The State Bar never established that she was not a joint client with her parents in the modification of the Kanama note for her benefit. Nor did it

establish that she did not authorize the use of her settlement proceeds to pay fees her family owed respondent. She testified that she could not recall whether or not she had done so.

[19] Although we conclude that the testimony and writing evidencing prior oral and written authorization by Mr. Laurita were plausible, they do not amount to clear and convincing evidence of a rule 5-101 violation. First of all, no fixed amount of fees for past services was agreed upon in advance of the actual settlement. The State Bar does not contend that a lien was created, but merely a pecuniary interest. However, it has pointed to no case law construing "pecuniary interest" in rule 5-101 to include a situation like the one here. All that was introduced in this record was evidence of unenforceable promises of future payment of an unquantified sum by the client's agent which the agent repeated in writing. Indeed, even if we assumed arguendo that exhibit F was evidence of a pecuniary interest in the personal injury recovery, the State Bar had the burden of proving by clear and convincing evidence that respondent "knowingly acquired" a pecuniary interest adverse to his client in violation of rule 5-101. Respondent did not make any use of exhibit F and instead, according to his testimony, specifically sought authorization for his application of \$1,100 of the settlement proceeds to past fees at the time of distribution in 1986. On this record, the State Bar did not establish a rule 5-101 violation. (Cf. *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 452.) We therefore affirm the dismissal of the charged violation of rule 5-101.

#### Mitigation and Aggravation

The finding in mitigation as to respondent's excellent reputation and good character was well supported by testimony and letters from numerous persons of high standing in the community. These included a priest, a state senator, and a number of California trial and appellate judges who were aware of the charges and the culpability determination made by the court but considered them completely out of character. All attested to his selfless devotion to community service and reputation for high moral character in his practice and in social settings. The judges who had observed him in court also had high

praise for his courtroom conduct. Among other activities in his career since admission in 1973, respondent co-founded the National Italian American Bar Association and was its first president. He estimated that 30 to 40 percent of his time in the mid-1980's was devoted to community service.

In aggravation, respondent had a prior public reproof imposed by stipulation on January 10, 1989, for failure to perform services in one matter in 1984 and for practicing law while suspended for nonpayment of dues during part of 1984. In mitigation at that time it was found that he was in severe economic straits and also under great emotional stress from the death of his father.

[20] There is no clear and convincing evidence in the record to support the findings in aggravation under standards 1.2(b)(ii) and 1.2(b)(iii). (Decision, pp. 30-31.) It is the State Bar's burden to prove aggravating factors as well as culpability by clear and convincing evidence to a reasonable certainty. (See, e.g., *Van Sloten v. State Bar*, *supra*, 48 Cal.3d at p. 933.) The hearing judge thus could not predicate a finding in aggravation of bad faith based on selected portions of Mr. Laurita's unreliable letters (exhs. 19 and 20) or inconsistent testimony or on grave doubts about the authenticity of exhibits F and 23. [21a] Nor is there a basis for a finding in aggravation under standard 1.2(b)(iv) for delay in restitution to Dana Laurita. The small claims judgment did not operate as *res judicata* on this issue. (See *Sanderson v. Niemann* (1941) 17 Cal.2d 563; see generally 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 202, p. 639.) While respondent ultimately paid the small claims judgment because it was never contested or set aside, Dana Laurita testified that she could not remember whether she authorized her father to pay respondent out of her recovery and that, in any event, all of her father's actions were within his authority, and Mr. Laurita testified that he did authorize respondent to pay himself. While his testimony was disbelieved, there was no clear and convincing evidence to meet the State Bar's burden in aggravation.

[21b] Nor was there clear and convincing evidence in support of the standard 1.2(b)(v) finding in

aggravation of indifference toward rectification. Since the clients never disputed respondent's right to be compensated for the services he had rendered them and the State Bar never proved he was not authorized to apply the \$1,100 to such services, there was no proof that respondent was indifferent toward rectification. Indeed, the clients admittedly benefitted from their receipt of substantial services for which they never paid. As in *Van Sloten v. State Bar*, *supra*, 48 Cal.3d at p. 933, we have no reason to find respondent did not have a good faith belief that his inaction was justified.

[22a] We also cannot adopt the hearing judge's finding in aggravation based on lack of candor under standard 1.2(b)(vi). She reached this determination based on the same resolution of "crucial issues of credibility" which she had initially resolved at the culpability phase in the respondent's favor. The decision states that the turnabout is predicated on the fact that "it is impossible to harmonize both Respondent's version of the event and the testimony and documentary evidence presented by the State Bar." (Decision, p. 32.) Nonetheless, at trial, she concluded that the most plausible explanation of all of the contradictory evidence in the culpability phase was that Mr. Laurita never told his daughter he had authorized respondent to pay other bills out of the recovery and lied about respondent misappropriating the funds to save face.

[22b] In contrast to Mr. Laurita's repeated self-contradictions, respondent's testimony was not implausible. He admitted that he was remiss for failing to appear to contest the small claims proceeding, and that he originally planned to appear despite improper service, and to cross-complain for fraud, but that he was out of state presiding over a national lawyers' meeting on the date of the hearing. He further testified that he thought he could still move to set aside any judgment for improper service, but soon thereafter became aware of the complaint to the State Bar. He did not know whether he would be faulted for suing impecunious clients who were apparently misrepresenting what occurred. He had never sued a client before and he was hesitant that any action he brought might be misconstrued. (R.T. pp. 839-841.)

[22c] His regrettable inaction in response to the small claims proceeding resulted in a judgment which he paid. However, it does not amount to clear and convincing evidence that he was not candid in his dealings with the clients or the State Bar. His letter to the State Bar investigator (exhibit 14) did not show lack of candor. The letter was expressly an attempt to respond from memory and referred to payment he believed was authorized by the client for past bankruptcy services. This was not inconsistent with exhibit 23 which included both the Kanama matter and the bankruptcy services. Nor is it implausible that, by the time this proceeding was brought in 1989, respondent forgot about the 1985 note from Mr. Laurita (exhibit F) since he testified that their basic agreement was oral and had been reiterated numerous times culminating in their meeting at the courthouse in August of 1986. The fact that authorization for payment was on one occasion confirmed in writing does not negate oral authorization. Indeed, Mr. Laurita himself testified that he forgot about exhibit F but, when it was shown to him at the hearing, it refreshed his recollection of repeated conversations on the subject.

It is Mr. Laurita's inconsistent acts and testimony that are not reconcilable no matter how respondent's actions are viewed. Nothing can adequately explain Mr. Laurita's conduct and testimony even on matters which clearly did not involve respondent, such as who testified at the small claims hearing. [23] Proof by clear and convincing evidence to a reasonable certainty means that irreconcilable conflicts in the testimony of the chief State Bar witness by their very nature severely undermine the State Bar's case. (Cf. *Lubetzky v. State Bar*, *supra*, 54 Cal.3d at p. 322.) Absent strong circumstantial evidence of culpability, the State Bar cannot be considered to have met its burden. It clearly did not do so here.

[24] Nevertheless, we do find lack of full cooperation with the State Bar as a finding in aggravation under standard 1.2(b)(vi). Respondent answered one of the State Bar's letters but ignored two other letters completely before answering the fourth.<sup>10</sup> In defending himself in this proceeding, respondent belatedly appears to have learned to take State Bar investigations seriously, to check his records and to respond timely to charges instead of letting the matter get stale and hoping that it would not require his attention. This prolonged, contested proceeding might have been avoided if respondent had been diligent in responding to the original State Bar inquiry.

[25] Although it is not a factor in aggravation, we also note that respondent's trial tactics obviously undermined his credibility with the hearing judge. By designating all of his trial exhibits for impeachment and not sharing them in advance with opposing counsel, he might have been precluded from offering those which contradicted his pretrial statement had the examiner objected. (See generally 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 55, p. 63.) He also unnecessarily prolonged the hearing and made the judge suspicious of his exhibits because of his tactics of surprise confrontation of the State Bar's chief witness.

We note that respondent also raises on review a request that we order further proceedings to investigate alleged prosecutorial and judicial misconduct. The declaration filed by respondent on these two issues is controverted by the examiner. No motion for disqualification of the hearing judge was ever made. We also note that the hearing judge made very favorable findings in mitigation which clearly did not demonstrate bias. In any event, since respondent's allegations have no bearing on the outcome of this proceeding, we see no basis to order further proceedings herein with respect to these claims.

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10. As indicated above, respondent testified that two months after the State Bar's second letter he met with Mr. Laurita and an attorney acting on the Lauritas' behalf in September of 1987 regarding both the claim against the estate for a real estate commission and the \$1,100 claimed misappropriation.

His erroneous belief that the matter would be dropped as a result of the September 1987 meeting does not excuse respondent's failure to respond to the State Bar's letter in December 1987.

## RECOMMENDED DISCIPLINE

In light of the major modifications we have made to the culpability findings, we must also revisit the discipline recommendation.

The heart of this case is a dispute over authorization to pay fees out of a recovery. In *Dudugjian v. State Bar*, *supra*, 52 Cal.3d 1092, two attorneys were found to have interpreted an ambiguous statement by their clients as authorization to pay themselves out of the clients' ultimate recovery. After they paid themselves over \$5,000 in fees, the clients objected and the attorneys initially promised to return the money but then refused to make restitution of the money for the entire pendency of the State Bar proceeding, claiming the clients reneged on their promise of payment. The hearing panel found a violation of rule 8-101(A) based on acceptance of the clients' testimony that they had not in fact given permission for the attorneys to pay themselves, but the panel also found that the lawyers honestly believed that they did have such permission. The Supreme Court decided that the appropriate sanction was a public reproof for violation of rule 8-101(A), which included an order for restitution plus interest.

Here, in contrast to *Dudugjian v. State Bar*, there is insufficient evidence of lack of authorization for payment for services which nonetheless were ultimately uncompensated. However, there are other minor rule violations.

In *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, we considered a similar case in which the State Bar also alleged misappropriation, but the referee found the respondent culpable only of violating rule 8-101(B)(1) for failure to notify the client of receipt of a partial settlement and recommended a public reproof. We concluded that the attorney had also violated rule 8-101(B)(3) and increased the discipline to two months stayed suspension and one year of probation including periodic auditing of respondent's trust account. Here, as in *Lazarus*, respondent improperly accounted to the client for client settlement funds. However, respondent's violation of rule 8-101(B)(3) appears unintentional, unlike in *Lazarus*, and he had far more favorable evidence in mitigation.

*Lewis v. State Bar* (1981) 28 Cal.3d 683 is also instructive. There, a lawyer was found to have violated rules 5-101, 6-101 and 8-101(B)(3) in handling the administration of an estate. He received a 30-day stayed suspension and one year of probation because the court found that his misconduct was the result of negligence and not motivated by bad faith or greed. Here, we found no rule 5-101 violation but we did find violations of rules 6-101 and 8-101(B)(3). Respondent's negligent conduct is less egregious than that of Lewis and his mitigation is far greater. Moreover, the client did not suffer harm but instead received substantial benefit from services for which no fee was paid.

[26a] Ordinarily, a reproof would likely be in order. Nonetheless, respondent has a prior public reproof which reflected a period of inattention in 1984 to proper management of cases, albeit when under great emotional stress from the death of his father. Respondent's prior public reproof indicates that greater discipline is appropriate here under standard 1.7(a). Respondent also testified to a long period in which he kept files in several locations which made it difficult for him to retrieve relevant records in response to the State Bar investigation. He indicated that prior to trial he had started to review all of his files and reorganize his practice. Such reorganization appears essential to avoid future problems.

[26b] Considering all of the factors in the record in light of relevant case law, we recommend six months stayed suspension on the probation conditions set forth below including trust accounting and completion of a law office management course. [27] We decline to recommend that respondent take the California Professional Responsibility Examination since he took and passed the Professional Responsibility Examination recently in compliance with the terms of his public reproof. We adopt the recommendation of the hearing judge that the State Bar be awarded costs pursuant to Business and Professions Code section 6086.10.

## FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law for six months, that

execution of such order be stayed, and that respondent be placed on probation for one year on the following conditions:

1. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

2. That during the period of probation, he shall report not later than January 10, April 10, July 10, and October 10 of each calendar year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

3. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by each quarterly report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) Money received for the account of a client and money received for the attorney's own account;

(2) Money paid to or on behalf of a client and money paid for the attorney's own account;

(3) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account in a bank authorized to do business in the state of California at a branch within the state of California and that such account is designated as a "trust account" or "clients' funds account";

(c) That respondent has maintained a permanent record showing:

(1) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(2) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "clients' funds account(s)" as appears in monthly bank statements of said account(s);

(3) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

4. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the

period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar.

5. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

6. That respondent shall promptly report, and in no event in more than 10 days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

7. That respondent provide satisfactory evidence of completion of a course on law office management which meets with the approval of his probation monitor within six months from the date on which the order of the Supreme Court in this matter becomes effective.

8. That at the expiration of the period of this probation if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of six months shall be satisfied and the suspension shall be terminated.

#### AWARD OF COSTS

It is recommended that costs incurred by the State Bar in the investigation, hearing and review of this matter be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.  
STOVITZ, J.